RIGHTS STUFF

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Is Creating A New Job A Reasonable Accommodation?

Joseph White began working for Interstate Distributor Company as a maintenance truck/trailer technician in July of 2008. His duties included repairing and maintaining truck parts, working on tires, lifting objects up to 80 pounds and lifting more than forty pounds on occasion about three times a week.

A year later, a motorcycle fell on White's leg and fractured it. He went on leave pursuant to the Family and Medical Leave Act. In September, Interstate wrote White and told him his FMLA time expired on October 16. The company asked him to begin "our interactive process to determine the status of your return to work and to explore any reasonable accommodations that Interstate can make to assist you."

His doctor said White needed temporary work restrictions for one to two months, during which he could not lift more than 20 pounds, climb or do tire or transmission work. His doctor anticipated that he would not need any work restrictions in a month or two.

White took his medical restriction letter to work, where he was told the company had no jobs that he could do with those restrictions. White said that he could still decommission trucks even with his restrictions. (When the company needed to sell a truck, they stripped it first; this is called decommissioning.) No one at Interstate decommissions trucks full-time, and doing this task requires the same physical abilities as a full-time tech position. Interstate denied his request and fired him in October of 2009, saying they didn't have any jobs that he could do, given his medical restrictions.

White sued, saying that Interstate had violated his rights under the Americans with Disabilities Act and/or under the Family and Medical Leave Act. He lost. The Court said that White could not perform the essential functions of his job and that he had identified no reasonable accommodations that Interstate could have provided. The only accommodation that he suggested was that he could decommission trucks full-time, but that was not a full-time job, and it had the same physical requirements as the tech job. The Court said that Interstate had met its duty to engage in an interactive process about accommodations with White.

The case is White v. Interstate Distributor Co., 2011 WL 3677976 (6th Cir. 2011).

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Unconstitutional to Ban Hormonal Therapy for Transgender Inmates

Wisconsin passed a law, Act 105, that prohibited state prisons from providing hormonal therapy or sexual reassignment surgery to their transgender inmates. Several transgender inmates sued, successfully.

At trial, several experts testified that gender identity disorder "can cause an acute sense that a person's body does not match his or her gender identity." These "feelings of dysphoria can vary in intensity. Some patients are able to manage the discomfort, while others become unable to function without taking steps to correct the disorder. A person with GID often experiences severe anxiety, depression and other psychological disorders. Those with GID may attempt to commit suicide or to mutilate their own genitals."

The experts said that hormone treatment is often sufficient to control the disorder, and that withdrawing hormones from people who have been receiving the treatment may cause serious problems.

The state argued that its legislature had the right to prohibit certain medical treatments when other treatment options are available, and that the new state law would help assure security in state prisons.

The Court noted the state did not produce any evidence that another treatment could be an adequate replacement for hormone therapy. It also noted that prisons provide other, more expensive medical care to other inmates. Providing hormone treatment to an inmate costs the state between $300 and $1000 a year. Providing quetiapine, an antipsychotic drug, costs $2,500 per inmate each year. Sex reassignment surgery costs about $20,000. In 2005, the prison paid $37,244 for a coronary bypass surgery and $32,897 for a kidney transplant.

The Court said, "Surely, had the Wisconsin legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this Court would have no trouble concluding that the law was unconstitutional. Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture." And the Court said that banning such treatment did not enhance security, as "the evidence showed transgender inmates may be targets for violence even without hormones." The Court said that the "legislators who approved Act 105 may have honestly believed they were improving prison security, but courts retain an independent constitutional duty to review factual findings where constitutional rights are at stake."

The case is Fields v. Smith, 2011 WL 3436875 (7th Cir. 2011).

Celebrating Abilities Resource Fair

Here's an opportunity to learn about products and services available to people with disabilities. A Celebrating Abilities Resource Fair will be held on Saturday, March 3, from 9:30 a.m. to 12:30 p.m., at Sherwood Oaks Christian Church, 2700 E. Rogers Road.

The fair will include informational break-out sessions, fun activities for kids and live animals. It's hosted by the Down Syndrome Family Connection and the Learning Tree preschool and kindergarten at Sherwood Oaks.

The animals will be provided by WildCare, A Critter's Choice, Indiana Jim's Reptiles, The Kasey Program and VIPaws.

For more information, call 812.720.9603 or visit www.downsyndromefamily connection.org.

Enhanced Penalty for Vandalizing Church Not a Violation of the First Amendment

Joshua Burke and two companions burglarized the True Gospel Assembly Church in Indianapolis in October of 2009. Burke served as a lookout while his companions broke into the church, where they spray-painted the walls and destroyed musical instruments. Burke also took an amplifier from the church.

Ordinarily such a crime would be a Class C felony. But Indiana law enhances burglary to a Class B felony if the building or structure burgled is used for religious worship. Burke challenged this enhanced penalty on First Amendment grounds and lost.

The U.S. Supreme Court has said that a statute does not violate the Establishment Clause of the First Amendment if it has a secular legislative purpose, if its primary or principal effect neither advances nor inhibits religion and if it does not foster an excessive governmental entanglement with religion.

The Indiana Court of Appeals found that Indiana's enhanced penalty for vandalizing a house of worship did not violate the First Amendment. The Court said that the purpose of the law "is not to give added protection to structures used for religious worship but to ensure the appropriate sentence for the offender." It said that the law reflects a legislative recognition that religious structures traditionally don't have security measures, that "crimes against structures used for religious worship are 'more repugnant to the community" and that "it takes more time to reform and rehabilitate those offenders who commit acts society deems more repulsive."

The Court said that the State, when it determines that a structure is used for religious purposes, is not getting excessively entangled in the question of what practices constitutes religious worship.

The case is Burke v. State of Indiana, 943 N.E. 2d 870 (Ind. Ct. App. 2011).

Starbucks Case Follow-Up

In the November, 2011 issue of The Rights Stuff, we described a recent discrimination case that had been filed against Starbucks. Elsa Sallard, a little person, had been hired by Starbucks in El Paso, Texas, to work as a barista. The restaurant trained her for three days. Because she was not tall enough to do her job as a barista without an accommodation, she asked for a stool or stepladder. That same day, the restaurant fired her, alleging that she posed a potential danger to customers and employees.

She filed a complaint of disability discrimination against Starbucks with the United States Equal Employment Opportunity Commission. The EEOC sued Starbucks on her behalf, and in August, Starbucks agreed to pay Sallard $75,000. It also agreed to implement a training program for managers in El Paso to ensure that they understand the ADA and its implications for coffee shops.

Under the ADA, employers have to provide reasonable accommodations for employees with disabilities to help them do their jobs. In most workplaces, providing a little person with a stool or stepladder so she can reach what she needs to reach would be a perfectly reasonable accommodation. Whether that would be true in a busy and crowded coffee shop is harder to say. If being a certain height is an essential job duty and stools would be unsafe because of the nature of the workplace, the employer should determine that before hiring the applicant, not three days later.

If you have a question about the ADA and its implications for you, please contact the BHRC.

HUD Issues New Nondiscrimination Rules

The federal Fair Housing Act has long prohibited discrimination in housing on the basis of race, color, religion, sex, national origin, familial status or disability. Now the U.S. Housing and Urban Development Department has added new protected categories to that list: actual or perceived sexual orientation, gender identity and marital status. The new rules apply to HUD-assisted housing, HUD-insured housing, approved lenders in any FHA mortgage insurance program and to any recipients or sub-recipients of HUD funds.

The new rules, which were issued on January 27, 2012, say covered housing providers may not ask tenants or prospective tenants about their sexual orientation or gender identity unless they are merely asking people to voluntarily self-identify their sexual orientation or gender identity for statistical purposes. The prohibition on inquiries does not prohibit asking people about their sexual orientation or gender identity in cases of providing temporary, emergency shelter that involves the sharing of sleeping areas or restrooms. Nor does it prohibit these questions for the purpose of determining the number of bedrooms to which a household may be entitled.

When HUD announced that it was considering these new rules and asked for public comment, some people said HUD had no legal authority to add new protected categories beyond that provided by the federal Fair Housing Act. HUD said that its mission is to "create strong, sustainable, inclusive communities and quality affordable homes for all. This includes LGBT persons, who have faced difficulty in seeking housing. Excluding any eligible person from HUD-funded or HUD-insured housing because of that person's sexual orientation or gender identity contravenes HUD's responsibility."

Employers Need to Be Careful With Attendance Policies

Some businesses have fairly rigid attendance policies. Their policies may give an employee a point for each day he misses work for whatever reason, and call for termination once he has reached a certain number of points. Or the policies may say that if an employee is unable to return to work without restrictions at the end of her family and medical leave, she is terminated. The U.S. Equal Employment Opportunity Commission says that it's targeting these types of inflexible leave policies. Recently the EEOC won a $20 million settlement against Verizon because the company refused to make exceptions to its attendance rules to accommodate employees with disabilities.

Employers need to build some flexibility into their leave and return-to-work policies. To be compliant with the Americans with Disabilities Act, employers should tell employees that if they are able to return to work at the end of their leave only with some medical restrictions, that will be evaluated on a case-by-case basis.

As is always the case in fair employment practices, employers should document their decisions carefully, keeping track of leave and accommodation requests and the reasons for the employer's response to those requests.